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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT A. MANN AND BANK OF THE SOUTHWEST, NATIONAL ASSOCIATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioners contend that the acts charged in the indictment do not constitute a conspiracy to misapply bank funds in violation of 18 U.S.C. 371 and 656, and that the government misled them into believing that their conduct was proper.

An indictment filed in the United States District Court for the Southern District of Texas charged petitioner Robert A. Mann, Chairman of the Board of Directors and Chief Executive Officer of the First National Bank of Waco, Texas ("Waco Bank"), and petitioner Bank of the Southwest, National Association, of Houston, Texas, with conspiring from December 1969 until February 1972 knowingly and willfully to misapply funds of the Waco Bank with intent to injure and defraud the Waco Bank, by

causing its funds to be converted to the use, benefit, and advantage of Mann, in violation of 18 U.S.C. 371 and 656.[1] More particularly, the indictment charged a scheme whereby Mann borrowed $6,900,000 from the Bank of the Southwest to purchase a controlling interest in the Waco Bank.[2] Bank of the Southwest charged Mann only 3 percent interest on his loan, although at that time the bank's prime rate was 8½ percent. In return for this preferential rate, Bank of Southwest required Mann to cause funds of the Waco Bank, in an amount equal to the unpaid principal, to be placed in a non-interest bearing account at Bank of the Southwest.[3] The indictment alleged that these funds of the Waco Bank thereby were converted to Mann's use and benefit, since the granting of the 3 percent preferential interest rate would save Mann approximately $350,000 in interest charges per year.[4]

In response to petitioners' pre-trial motions to dismiss the indictment, the district court held an evidentiary hearing and on July 23, 1974, issued a Memorandum and Order dismissing the indictment (Pet. App. B); the court of appeals reversed (Pet. App. A).

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[1]The full text of the indictment is reprinted in a footnote to the court of appeals' opinion (Pet. App. A-3—A-6, n. 1).

[2]Bank of the Southwest was to fund $4,000,000 of this amount, with the remaining $2,900,000 to be raised by Republic National Bank.

[3]The bill of particulars specified that these funds of the Waco Bank were to be deposited in a demand account in the name of the Waco Bank (see Pet. 5-8, n. 2).

[4]The indictment further alleged that Mann was to reduce the unpaid balance of his loan to $3,000,000, and at the same time the amount of the Waco Bank funds on deposit in the demand account at the Bank of the Southwest would be reduced to $3,000,000. Mann then was to pay 4 percent interest on the remaining balance of his loan, and at that preferential rate, Mann would save approximately $110,000 in interest charges per year.

1. This petition challenges the court of appeals' conclusion that the pre-trial motion to dismiss should have been denied. It thus comes at an interlocutory stage of the proceedings, seeking to bring the case here before the record is fully developed at trial. Since the questions petitioners seek to have this Court now review can be considered after a trial on the merits, and, if petitioners are acquitted, need not be considered by this Court at all, there is no present need for review by this Court, even if the issues presented might otherwise warrant further review, which we believe they do not.

2. Petitioners contend that the indictment, as "clarified" by the bill of particulars, fails to make out a conspiracy willfully to misapply bank funds, in violation of 18 U.S.C. 371 and 656. It is their theory that Waco Bank's retention of legal title to the funds on deposit in the Bank of the Southwest precludes a showing that the funds were converted, which they contend is a necessary element of the offense defined in 18 U.S.C. 656 (Pet. 15). We think it clear that when a bank officer commits millions of dollars of bank funds to a use from which he derives extensive personal benefit with little or no benefit to the bank, there has been a criminal misapplication of the bank's funds.

In any event, in this case there was a conversion despite the Waco Bank's retention of legal title to the funds. The maintenance of the account at the Bank of the Southwest deprived the Waco Bank of the actual possession of its money. See *United States* v. *Brookshire,* 514 F.2d 786 (C.A. 10); cf. *Pan American Petroleum Corp.* v. *Long,* 340 F.2d 211, 219-221 (C.A. 5), certiorari denied, *sub nom. Southwestern Life Insurance Co.* v. *Pan American Petroleum Corp.,* 381 U.S. 926. Additionally, petitioners' agreement to maintain the Waco Bank's account at levels corresponding to the unpaid balance of Mann's personal loan deprived the Waco Bank of its right to unfettered control of its own funds while Mann's loan remained unpaid. The

Waco Bank thereby was prevented from exercising the right to use its own funds for its own benefit—for example, by depositing those funds in an interest bearing account. This interference with the Waco Bank's enjoyment and use of its own money constituted a classic instance of conversion. See *United States* v. *Brookshire, supra;* cf. *A. C. Rent-A-Car, Inc.* v. *American Nat. Bank & Trust Co.*, 339 F. Supp. 506, 511 (S.D. Ala.), affirmed *per curiam*, 477 F.2d 564 (C.A. 5); *Veeco Instruments, Inc.* v. *Candido*, 70 Misc. 2d 333, 334 N.Y. Supp. 2d 321 (N.Y. Sup. Ct.).

3. Petitioners argue further that they were not given fair notice that their conduct was criminal because the government misled them into believing that their activities were proper (Pet. 18-23). But this claim amounts to an assertion that there was no willful misapplication of funds; it is thus an issue for resolution at trial, not a proper basis for dismissal of an indictment under Rule 12, Fed. R. Crim. P. See *United States* v. *Knox*, 396 U.S. 77, 83 n. 7.[5]

In any event, the government did not mislead petitioners into believing that their loan scheme was proper. Petitioners' argument rests primarily on a confusion between government support for the traditional and legitimate use of a compensating balance (where the borrower is required to maintain an account with the lending bank corresponding to the size of his loan) as government approval for the improper use of a compensating balance (where a third party—here, the Waco Bank—which receives no benefit from a loan, is required to maintain the corresponding balance with the lending bank).

It is true that in 1970, in a letter to a Senate committee, the Antitrust Division of the Department of Justice urged Congress not to outlaw the traditional use of compensating balances. 116 Cong. Rec. 32125-32126 (1970). Similar

[5]For example, with regard to the issue of willfulness, we are advised that the government's evidence at trial will show deliberate efforts by petitioner Mann to conceal critical aspects of these transactions from bank auditors.

views were expressed in letters to Congress by officials of the Department of the Treasury and the Federal Reserve Board, and in a report by the Senate Committee on Banking and Currency. *Id.* at 32124-32129; S. Rep. No. 91-1084, 91st Cong., 2d Sess. 17 (1970). A reading of these letters and the Senate report shows, however, that approval was expressed solely for the traditional use of compensating balances. There have been no government pronouncements approving the type of compensating balance loan employed by petitioners. Indeed, that type of scheme was specifically disapproved in Banking Circular No. 31 (Pet. App. C-6), which was circulated to the banking community in October 1970. The misapplication of funds charged in the indictment continued after this date; in fact, the preferential loan was renewed thereafter.[6]

Under these circumstances, petitioners' reliance on *United States* v. *Laub*, 385 U.S. 475; *Bouie* v. *City of Columbia*, 378 U.S. 347; and *Raley* v. *Ohio*, 360 U.S. 423, is misplaced.[7] In those cases, this Court held that the

[6]We are unable to discern the basis for petitioners' assertion (Pet. 22) that this Court's decision in *Coffin* v. *United States*, 156 U.S. 432, precludes reliance on the renewals of the loans as constituting misapplication of the bank funds. *Coffin* does not discuss renewals of improper loans; it holds first that the refusal to instruct concerning the presumption of innocence and the instructions given concerning the burden of proof were error, and second that the offense of making a false entry is not committed where the transaction entered, through improper, actually occurred. 156 U.S. at 463.

[7]Petitioners also mistakenly rely on *United States* v. *Insco*, 496 F.2d 204 (C.A. 5), where the court reversed a conviction for conduct which had been shown at trial to have been generally accepted as proper. Their allegations in this regard amount to a contention that their actions were not willful, a controverted issue that is to be decided by the finder of fact after trial. As the court below noted (Pet. App. A-18, n. 7):

> * * * The decision in *Insco* is authority only for the proposition that, under the facts of that case, it was improper to *convict* Insco. The Court's opinion does not relate to the issue in this

government may not prosecute a citizen after actively misleading him by authoritative assurances that his conduct was proper: here, the government gave no such assurances.[8]

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case, which is whether the Government may *try* the defendants. This distinction is also applicable to *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S.Ct. 1967, 12 L.E.2d 894 (1964), relied on by defendants. Whatever the merits of an *Insco* defense under the facts of this case, defendants will have an opportunity to raise it at trial. *Cf. United States* v. *Pennsylvania Industrial Chemical Corp.*, 411 U.S. 655, 674-675, 93 S.Ct. 1804, 1816-1817, 36 L.Ed.2d 567 (1973); *United States* v. *Murdock*, 290 U.S. 389, 395-396, 54 S.Ct. 223, 225-226, 78 L.Ed. 381 (1933).

[8]Petitioners cite a letter written on May 4, 1971, by the then Chief of the Fraud Section of the Criminal Division of the Department of Justice (Pet. 13) and one written on March 21, 1973, by the Office of the Comptroller of the Currency, expressing reservations about the wisdom or feasibility of initiating prosecutions for the making of compensating balance loans of the type employed by petitioners, where the loans were made before the issuance date of Circular 31. These letters, however, did not imply that this type of compensating balance loan was a proper banking arrangement, nor that particularly egregious transactions or loans renewed after October 1970 should not be prosecuted.

Moreover, it is the prerogative of the executive to initiate criminal proceedings, and courts should not "interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." *United States* v. *Cox*, 342 F.2d 167, 171 (C.A. 5), certiorari denied *sub nom. Cox* v. *Hauberg*, 381 U.S. 935.

Petitioners also refer to recent actions by the Board of Governors of the Federal Reserve System approving the formation of bank holding companies to acquire certain banks, which, they contend, indicate the Board's approval of the type of transaction involved here (Pet. 23-24; Pet. App. D-1—D-11). These actions, occurring in September 1974 and thereafter, could hardly have motivated petitioners' conduct between December 1969 and February 1972, the dates of the charged conspiracy. In any event, petitioners rely upon the characterization of the approved transaction by the dissenting members of the Federal Reserve Board. The Assistant Secretary of the Federal Reserve Board has informed us that it is not the policy of the Federal Reserve System to approve compensating balance loans of the type involved here, and the dissents in the cases upon which petitioners rely reflect simply disagreements concerning the analysis of the facts involved in those cases. The full text of the Assistant Secretary's response to our inquiry concerning these cases is contained in the government's reply brief in the court below, a copy of which we are lodging with the Clerk of this Court.

4. Petitioners assert that the court of appeals improperly concluded that petitioners' defense of lack of notice should be considered at trial, rather than on a pre-trial motion under Rule 12, Fed. R. Crim. P. They cite *Laub, supra,* in support of their claim (Pet. 26-27). *Laub* involved a charged violation of 8 U.S.C. 1185(b). In concluding that the acts charged in the indictment did not constitute a violation of that statute, and thus that the indictment was properly dismissed, this Court rested its decision "entirely upon our construction of the relevant statutes and regulations" (385 U.S. at 477). Here, the construction of the relevant statutes and regulations leads to no such conclusion. Petitioners argue instead that they are entitled to acquittal since *they* so construed the statute. This, as the court below correctly concluded, is a defense going solely to the issue of intent, and thus properly is a matter for consideration on the trial of the general issue.[9]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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[9]*United States* v. *Covington*, 395 U.S. 57, on which petitioners also rely, is not to the contrary. That case holds that a defense of self-incrimination to a Marihuana Tax Act prosecution may often be a defense "capable of determination without the trial of the general issue" (*id.* at 60) and thus appropriate for resolution on a pre-trial motion under Rule 12, Fed. R. Crim. P. In contrast, a defense going to whether or not petitioners acted willfully is directly related to the trial of the general issue—whether there was a willful misapplication of bank funds.